STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2014
v	No. 313692 Saginaw Circuit Court
PATRICK JERMAINE CALBERT, Defendant-Appellant.	LC No. 12-037135-FH

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

RONAYNE KRAUSE, P.J. (*concurring in part and dissenting in part*)

I concur with the majority in all respects other than the majority's reversal of defendant's conviction of attempted murder and corresponding conviction of felony-firearm. I conclude that the prosecution provided sufficient evidence to find defendant guilty of attempted murder, so I would affirm that conviction and decline to consider whether the bindover was proper.

The majority correctly explains that attempted murder and assault with intent to commit murder are mutually exclusive. Indeed, they are defined by statute as excluding each other. The majority's recitation of the applicable law, in the abstract, is entirely correct and I feel no need to repeat it. Rather, I disagree with the majority's characterization of the events that occurred in this matter and, consequently, with its application of the law to those events. In particular, the majority appears, as I understand it, to conclude that because a gun was involved, the offense must have *per se* been assault with intent to commit murder. I disagree.

I do agree that *if* defendant had, in fact, actually shot the gun at the officers at any time, explicitly threatened to do so, or even actually pointed the gun at the officers, this *would* have constituted an assault with intent to commit murder. In *People v Smith* (*On Rehearing*), 89 Mich App 478; 280 NW2d 862 (1979), the defendant, a prisoner, attempted to escape by grabbing a guard's revolver and firing it at the guard twice at point-blank range. Unbeknownst to the prisoner, the guard had unloaded his revolver pursuant to prison regulations. The defendant was charged with both assault with intent to commit murder and attempted murder, both of which the trial court dismissed. This Court held, in part, that:

> Given the plain language of the attempted murder statute, we find that the trial court clearly erred in dismissing both counts. Insofar as the evidence amply demonstrated that the defendant tried to murder the prison guard, he necessarily

> violated one of the above provisions: if by assault, he was guilty of assault with intent to murder; if "by *any* means not constituting the crime of assault with intent to murder", he was guilty of attempted murder. [*Smith*, 89 Mich App at 483 (emphasis in original).]

The guard in *Smith* could not have reasonably apprehended an immediate battery, in light of his actual knowledge that the gun was unloaded, but the defendant had committed "acts sufficiently proximate to that end" to constitute an attempted battery. Consequently, he was "guilty of a criminal assault notwithstanding the absence of his actual present ability to commit the battery." Therefore, the trial court properly dismissed the attempted murder charge but improperly dismissed the assault with intent to commit murder charge. Although *Smith* is illustrative, the facts at bar differ significantly.

Our Supreme Court later cited *Smith* with approval in explaining that "present ability" referred to proximity rather than factual possibility. *People v Reeves*, 458 Mich 236, 243; 580 NW2d 433 (1998). "[O]ur criminal jurisprudence has consistently emphasized that for a criminal assault to occur, a greater degree of proximity to completion of the offense, i.e., present ability, is required than for nonassault attempts." *Id*. at 243. In *Reeves*, our Supreme Court emphasized that in an "apprehension-type" assault, an undisclosed actual inability on the defendant's part to effectuate the anticipated harm is irrelevant. *Id*. at 244. Nonetheless, an assault requires either actual or reasonably apprehended *immediate* ability to *immediately* effectuate that anticipated harm. *People v Lilley*, 43 Mich 521, 525-526; 5 NW 982 (1880), cited with approval in *Reeves*, 458 Mich at 243. If a defendant is stopped before arriving at the point where harm could be imminent, the defendant's acts are not an "assault." *Lilley*, 43 Mich at 525-526.

In contrast, an "attempt" merely requires a criminal intent and acts in furtherance of that intent that go beyond mere preparation or mere planning. *People v Coleman*, 350 Mich 268, 276-279; 86 NW2d 281 (1957). Acts in furtherance will be sufficient when they cease, to even the slightest extent, to be ambiguous or equivocal or otherwise "as consistent with good as with evil." *Id*. at 276-278. Consequently, unlike an assault, an attempt may occur long before a defendant achieves any realistic ability to execute his or her criminal objective. Rather, an attempt occurs at a potentially much earlier stage, as soon as a defendant commits an act unambiguously explicable only as facilitating the commission of an intended crime.

The facts of this case may be peculiar, but they illustrate the demarcation between an attempt and an assault. Notwithstanding the police officers' understandable fear of being shot and defendant's obvious ultimate purpose, defendant made no threats and simply never arrived at the point where he had a "present ability" to inflict any harm with the gun. Defendant was stopped from doing anything while he was handcuffed with his hands behind his back, apparently slithering backwards from a position on the center console of the police vehicle after retrieving the gun from the front seat, and from there he went directly to a position where his back, and consequently his hands and the gun, were pressed against the back of the rear seats. Although officers explained that it would have been possible for defendant to take some kind of crude aim and fire the gun even with his hands handcuffed behind his back, defendant was given no opportunity to do so.

Simply put, defendant's acquisition of the gun could only have been an act in furtherance of a design to kill someone with it. However, he simply did not—fortunately—succeed in achieving a present ability to do so. Consequently, even though this *would* have constituted an assault had officers not timely intervened, the scenario never progressed that far. Defendant was correctly charged with, and convicted of, attempted murder. His convictions should be affirmed.

/s/ Amy Ronayne Krause